Gregory M. Fox, State Bar No. 070876
Parry A. Black, State Bar No. 291472
BERTRAND, FOX, ELLIOT, OSMAN & WENZEL
The Waterfront Building
2749 Hyde Street
San Francisco, California 94109
Telephone: (415) 353-0999
Facsimile: (415) 353-0990
Email: gfox@bfesf.com
pblack@bfesf.com

Attorneys for Defendant
CITY OF ROHNERT PARK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EZEKIAL FLATTEN,

Plaintiff,

v.

CITY OF ROHNERT PARK, JACY TATUM, JOSEPH HUFFAKER, THE HOPLAND BAND OF POMO INDIANS, STEVE HOBB, and DOES 1-50, inclusive,

Defendants.

Case No. 4:18-cv-06964-HSG

DEFENDANT CITY OF ROHNERT PARK'S MOTION TO DISMISS COMPLAINT

Date: March 28, 2019
Time: 2:00 p.m.
Location: Oakland Courthouse
Courtroom 2 - 4th Floor
1301 Clay Street, Oakland, CA 94612

Hon. Haywood S. Gilliam, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. NOTICE

TO PLAINTIFF EZEKIAL FLATTEN: PLEASE TAKE NOTICE that on Thursday March 28, 2019, at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the above-entitled Court, located at 1301 Clay Street, 3rd Floor, Oakland CA, 94612, Defendant CITY OF ROHNERT PARK will and hereby does move this Court for an order granting dismissal of the claims specified below and contained in Plaintiff's Complaint, for failure to state claims upon which relief can be granted.

This motion is brought pursuant to Federal Rules of Civil Procedure (FRCP), Rule 12(b)(6), as set forth more fully in the Memorandum of Points and Authorities below, on the grounds that dismissal is appropriate because the complaint fails to allege facts sufficient to state a *Monell* claim or a claim under the California Bane Act upon which relief can be granted against the City.[1] This motion is based on this notice, the memorandum of points and authorities, the papers and pleadings on file herein, and on such oral and documentary evidence as may be adduced at the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

II. SUMMARY OF ARGUMENT AND STATEMENT OF ISSUES TO BE DECIDED

Plaintiff EZEKIAL FLATTEN brings this action against defendants the CITY OF ROHNERT PARK ("the City"), JACY TATUM, JOSEPH HUFFAKER, THE HOPLAND BAND OF POMO INDIANS, and STEVE HOBB for violation of civil rights under 42 U.S.C. § 1983, the California Bane Act, and related state law claims arising out of an incident on December 5, 2017, in which Plaintiff claims that his vehicle was unlawfully stopped and his property unlawfully seized by Defendants Huffaker and Hobb.

Plaintiff's Complaint fails to state facts sufficient to state a *Monell* cause of action against the City, relying on "naked assertions" devoid of "further factual enhancement." (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).) Similarly, the allegations of the Complaint do not suffice to allege a Bane Act claim, as Plaintiff's allegations do not show that any defendant employed "threat, intimidation, or coercion" during the subject incident.

///

[1] The City does not move to dismiss cause of action eight (conversion), as this was sufficiently pled.

III. STATEMENT OF PERTINENT FACTS

Plaintiffs' Complaint alleges that on December 5, 2017, at about 12:00 p.m., he was traveling southbound on 101 in Mendocino County when he was pulled over by City Police Officer Huffaker and Defendant Steve Hobb, the Chief of Police of the Hopland Band of Pomo Indians. (Complaint ¶¶ 11-12.) Plaintiff describes the officers as driving an "unmarked, black police SUV," wearing bulletproof vests and "green military-style uniforms with no badges, insignia, or nametags," and were carrying firearms. (Complaint ¶¶ 12-13.) The Complaint alleges that the officers did not explain the reason for the traffic stop but instead questioned Plaintiff about where he was driving. (Complaint ¶ 13.) The officers then allegedly removed a sealed cardboard box from the Plaintiff's vehicle, opened it with a knife, removed the approximately three pounds of cannabis inside and left the scene. (Complaint ¶¶ 14-15.) They took a photo of Plaintiff and his drivers' license, but did not give him a ticket or a receipt for the seized cannabis. (Complaint ¶¶ 14-15.)

With respect to the City as Defendant, Plaintiff alleges that the "Interdiction Team conducted the affairs of an enterprise through the custom and practice of making unlawful traffic stops on the Highway 101 corridor … [and] used the unlawful stops as a pretext to unlawfully search vehicles for cannabis and cash" and that "[t]his custom and practice was known of and approved by the chain of command of the Department of Public Safety for the [City], including its former Chief Brian Masterson." (Complaint ¶¶ 46, 48.) The Complaint further alleges that "an internal investigation was launched at the Rohnert Park Department of Public Safety. Shortly thereafter, Defendant Tatum [a City employee] resigned from the force, Defendant Huffaker was placed on administrative leave, and the Director of the Department announced his retirement." (Complaint ¶ 25.)

IV. LEGAL ARGUMENT

A. The Complaint Fails to State Facts to Withstand Dismissal under FRCP Rule 12(b)(6)

Dismissal under FRCP Rule 12(b)(6) is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." (*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).) The Court must determine whether plaintiffs would be entitled to some form of relief if the facts alleged in the complaint were true. (*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated in part by Twombly*, 550 U.S. at 560; *De La Cruz v. Tormey*, 582 F.2d

45, 48 (9th Cir. 1978).) However, the Court need not accept as true, conclusionary allegations, unreasonable inferences, legal characterizations or unwarranted deductions of fact contained in the complaint. (*Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994); *Western Mining Council v. Watt*, 643 F.2d 618, 630 (9th Cir. 1981).)

FRCP Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation…A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'…Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" (*Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.) "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (*Iqbal*, 556 U.S. at 678-679.) Accordingly:

> [T]o be entitled to the presumption of truth, allegations in a complaint … may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts … the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

(*Eclectic Prop.'s East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014); *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).) "*Twombly* and *Iqbal*…distilled to their essence, impose two requirements. First, the reviewing court…is not required to credit legal conclusions…Second, the complaint cannot survive a motion to dismiss unless it alleges facts that plausibly (not merely conceivably) entitle plaintiff to relief." (*Maya v. Centex Corp*., 658 F.3d 1060, 1067-1068 (9th Cir. 2011); *Chavez v. U.S.*, 683 F.3d 1102, 1109 (9th Cir. 2012).)

B. The Sixth Cause of Action for §1983 Municipal Liability Is Unsupported by Facts

Because the City cannot be held vicariously liability under §1983, its liability must be based on a policy, custom or practice of the entity. (*Monell v. Dept. of Soc. Svcs.*, 436 U.S. 658, 691 (1978).) The sixth cause of action adds no facts to state a valid *Monell* claim against the City under any theory.

1. <u>The FAC Fails to Show a CITY Pattern, Policy or Custom</u>

To show municipal liability based on a custom or practice, the critical issue is whether there was a particular custom or practice that was so widespread as to have the force of law. (*Board of Comm'rs of*

Bryan Cty. v. Brown, 520 U.S. 397, 404 (1997).) "The custom or policy must be a 'deliberate choice to follow a course of action … made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" (*Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), *citing Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion).) "It is not sufficient for a plaintiff to identify a custom or policy, attributable to the municipality, that caused his injury. A plaintiff must also demonstrate that the custom or policy was adhered to with 'deliberate indifference to the constitutional rights of [parties]." (*Castro*, 833 F.3d at 1076; *City of Canton v. Harris*, 489 U.S 378, 392 (1989).)

Plaintiff's Complaint contains no factual allegations at all that the City had a pattern, policy, or custom of violating constitutional rights via traffic stops and cannabis seizures. Rather, it alleges that "by and through the acts and omissions of its Interdiction Team, [the City] conducted the affairs of an enterprise through the custom and practice of making unlawful traffic stops." (Complaint ¶ 46.) In so doing, the Complaint appears to attempt to hold the City liable under § 1983 under a theory of *respondeat superior*, which is, of course, impermissible.

The vague conclusion that some lower-level City employees were engaged in "the custom and practice of making unlawful traffic stops" is not a sufficient factual basis to meet the pleading burden on a *Monell* claim. The sparse factual allegations in the Complaint relate only to Plaintiff's particular incident, and there are no facts showing a practice or custom beyond the subject incident. Unless the policy itself is unconstitutional, or an authorized policymaker committed the unconstitutional act, "Liability for improper custom may not be predicated on isolated or sporadic incidents." (*Johnson v. City of Vallejo*, 99 F.Supp.3d 1212, 1218 (E.D. Cal. 2015), *quoting Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) *holding modified by Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001).)

2. <u>The Complaint Fails to State Facts to Support a Ratification Claim</u>

"To show ratification, a plaintiff must prove that the 'authorized policymakers approve a subordinate's decision and the basis for it." (*Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999); *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 123-124 (1988); *Pembaur*, 475 U.S. at 480-481.) Municipal policymakers must make a conscious, affirmative, deliberate choice to endorse a subordinate's decision and the basis for it. (*Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992).) "[M]ere refusal

to overrule a subordinate's completed act does not constitute approval. 'To hold cities liable under section 1983 whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would simply smuggle *respondeat superior* liability into section 1983." (*Christie*, 176 F.3d at 1239-1240; *Praprotnik*, 485 U.S at 128-130; *Gillette*, 979 F.2d at 1348.) "We decline to endorse this end run around *Monell*." (*Gillette*, 979 F.2d at 1348.) Plaintiff must show municipal policymakers knew of unconstitutional conduct by subordinates before the constitutional violations ceased. (*Christie*, 176 F.3d at 1239-1240.)

The Complaint contains only the sparsest of allegations in this regard – that "this custom and practice was known of and approved by the chain of command of the Department of Public Safety for the [City], including its former Chief Brian Masterson." (Complaint ¶ 48.) This is a conclusion, not a factual allegation, and is insufficient to state a *Monell* claim under a theory of ratification.[2] Recitation of the elements of municipal ratification does not suffice to state a claim. (*Iqbal*, 556 U.S. at 678-679.)

3. <u>The Complaint Fails to State a Claim Based on Inadequate Training</u>

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." (*Connick v. Thompson*, 563 U.S. 51, 61 (2011).) The "focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." (*City of Canton*, 489 U.S. at 390-391.) Inadequate training claims require a showing of deliberate indifference to a constitutional right. This standard is met when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights that the policymaker of the city can reasonably be said to have been deliberately indifferent to the need." (*Id*. at 390; *Connick*, 563 U.S. at 62.)

Although this is a high standard, the Supreme Court warned that "To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under §1983. In virtually every

[2] And, indeed, Plaintiff's allegation that an internal investigation of this incident led to Defendant Tatum's resignation, Defendant Huffaker's administrative leave, and the Director's retirement implies that any alleged "custom and practice" of the Interdiction Team was in fact <u>not known</u> to the City.

instance where a person has had his or her constitutional rights violated … a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident. … Thus, permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities – a result [the Supreme Court] rejected in *Monell*." (*City of Canton*, 489 U.S. at 391-392.)

Plaintiff's Complaint makes no mention of the training received by any officer or how such training was ineffective or inadequate. He has not made out a *Monell* allegation under this theory. Indeed, since Plaintiff's claims relate to intentional acts by police officers, and not constitutional violations which occurred as a result of mistake or inexperience, the City submits that a *Monell* claim for inadequate training cannot be alleged under these facts, and that its Motion to Dismiss should be granted without leave to amend in this regard.

C. The Seventh Cause of Action for Bane Act Violation is Unsupported by Facts

The California Bane Act proscribes the interference "by threat, intimidation, or coercion … with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States [or the State of California]." (Cal. Civ. Code § 52.1(a).) Following the 9th Circuit's decision in *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018), the element of "threat, intimidation, or coercion" need not be "transactionally independent" to the underlying constitutional violation. While the element of "threat, intimidation, or coercion" may now be pled as occurring simultaneously with the complained of constitutional violation – as in an allegation of excessive force – it has not been read out of the statute.

When evaluating a claim under the Bane Act, a reviewing court considers "whether a reasonable person, standing in the shoes of the plaintiff, would have been intimidated by the actions of the defendants and have perceived a threat of violence." (*Richardson v. City of Antioch*, 722 F. Supp. 2d 1133, 1147–48 (N.D. Cal. 2010); *citing Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1289–1290 (9th Cir.2001) (emphasis added).) If a Plaintiff proceeds under a theory of coercion (where threats and violence are absent), he must show "such force, either physical or moral, as to constrain [the plaintiff] to do against his will something he would not have done." (*Meyers v. City of Fresno*, No. 10–2359, 2011 WL 902115, at *7 (E.D.Cal. Mar. 15, 2011).)

Cases in which coercion sufficient to state a Bane Act claim was found include where: officers kicked in a front door, screamed at a plaintiff, and tased another plaintiff (*Richardson, supra*); an officer tased a student during a *Terry* frisk (*Thomas v Dillard*, 212 F.Supp.3d 938 (S.D. Cal. 2016)) and where officers pointed a gun at an arrestee during his arrest, then retaliated against him following his release (*Cornell v. City & County of San Francisco*, 225 Cal.Rptr.3d 356 (App. 1 Dist. 2017).)

Conversely, no Bane Act claim was found where there were only allegations of: phone calls made seeking to collect on a debt (*Herrera v. AllianceOne Receivable Mgmt., Inc*., 170 F. Supp. 3d 1282, 1287–88 (S.D. Cal. 2016); where an officer surreptitiously videotaped a woman using the restroom (*Agent Anonymous v. Gonzalez*, No. 16-CV-0374 W (BLM), 2016 WL 8999471, at *4 (S.D. Cal. Dec. 14, 2016); or where city employees requested that a private entity vacate a tennis pro shop and padlocked the doors after they left (*Cheviot Hills Sports Ctr., Inc. v. City of Los Angeles*, No. B249719, 2014 WL 4163019, at *5 (Cal. Ct. App. Aug. 22, 2014).)

In his Complaint, Plaintiff describes a traffic stop unaccompanied by threats or violence. He describes the vehicle as unmarked and the Defendants' clothing as "green military-style uniforms with no badges, insignia, or nametags." (Complaint ¶¶ 12-13.) While he alleges that they were carrying firearms, he makes no allegation that he was threatened with a firearm at any time. "Importantly, the showing of force or threat of force required by Civil Code 52.1 is much greater than the mere force sufficient to establish forcible entry and detainer." (*Cheviot Hills Sports Ctr., Inc. v. City of Los Angeles*, No. B249719, 2014 WL 4163019, at *5 (Cal. Ct. App. Aug. 22, 2014).) What Plaintiff describes is an interaction between three people which contained neither violence, threats, nor coercion. Even if Plaintiff is proceeding under a theory that acting under color of law is, in and of itself sufficiently coercive to make out a Bane Act Claim, his factual allegations show that he did not believe himself to be in the presence of legitimate law enforcement officers.

Plaintiff alleges that he was unlawfully stopped and that his property was unlawfully seized. What he does not allege is that any of the above was accomplished through the use of force, threats, violence, or coercion. His Bane Act claim should be dismissed accordingly.

///

///

V. CONCLUSION

For the reasons set forth above, Defendant respectfully submit that Plaintiff's causes of action against the City for a *Monell* violation and under the Bane Act be dismissed.

Dated: December 20, 2018

BERTRAND, FOX, ELLIOT, OSMAN & WENZEL

By: */s/ Parry A. Black*
Gregory M. Fox
Parry A. Black
Attorneys for Defendant
CITY OF ROHNERT PARK